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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAULA SKERSTON, Plaintiff and Appellant, v. PACIFIC BELL TELEPHONE COMPANY, Defendant and Respondent.	G051600 (Super. Ct. No. 30-2013-00685174) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Mary F. Schulte, Judge. Affirmed.

Paula Skerston, in pro. per., for Plaintiff and Appellant.

AT&T Services Legal Department and David J. Benner for Defendant and Respondent.

* * *

Plaintiff and appellant Paula Skerston appeals from a judgment in favor of defendant and respondent Pacific Bell Telephone Company on her complaint for negligence and nuisance. She appeals only as to the negligence cause of action, arguing the evidence showed there was a duty, breached by defendant, that caused her damages. She also argues there was structural error requiring reversal. Finding none of these claims persuasive, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff lives in one of four apartments in a unit that is part of a larger 90-unit apartment complex (Complex). All four apartments have windows facing Eugene Drive in Fullerton.

Defendant provides telephone, internet, video, and 911 and other services to plaintiff's neighborhood, including monitoring services for people who have medical conditions. When there is a power outage, including planned power outages, defendant continues to provide power using a diesel generator. Its generators meet standards set by the United States Environmental Protection Agency and California Air Resources Board.

Plaintiff claimed there were five power outages, each planned by Southern California Edison (SCE), at which times defendant placed its generator in her neighborhood. Two of her neighbors sharing the same four-unit building and two of defendants' employees testified they remembered it happening only one time. Plaintiff testified before each outage she received a notice from SCE. She produced only two notices.

The notices stated that although there was a time period stated for the planned outage, they were not exact and the power could be turned off more times than the time designated. Defendant received one such notice from SCE.

Plaintiff thought the outages were scheduled to start about 11:00 p.m. and end between about 7:00 a.m. and 8:00 a.m. According to plaintiff, defendant set out the

generator about an hour before the outage and did not remove it until the next morning. One time the generator remained after power was restored.

Richard Nunley, defendant's supervisor in charge of placing generators, testified defendant was responsible for providing continuous service to its customers. Because defendant does not know when the power will come back on or whether it will go off again, its practice is to put a generator at the site, keep it there overnight, and then check it in the morning.

Plaintiff testified every time a generator was used she smelled diesel and could not sleep, despite the fact she closed all her doors and windows and wrapped her wall-mounted air conditioner with a large trash bag. Kevin Carroll, defendant's employee who set up the generator on one occasion, spoke to plaintiff when she complained and he suggested she close her windows and that would eliminate any smell. She replied she should not have to close her windows.

Carroll testified he saw exhaust from the generator going straight up into the air and not toward plaintiff's apartment. He believed the generator had been placed in a good location and thought the smell would go up into the air before it reached the apartments.

Dennis McCartney, defendant's employee who picked up the generator, also believed it had been located well—across the street from the Complex. He believed the fumes would rise and dissipate and not go near the apartments.

Two of plaintiff's neighbors testified the generators were placed generally the same distance from their apartments as from plaintiff's. They did not smell diesel when the generator was in use. The noise was not bothersome nor was the sleep of anyone in their family disturbed.

Plaintiff put on no evidence as to the noise level or air quality during the time the generators were in use.

At the time the generators were used plaintiff was the only one of the approximately 180 tenants in the complex who complained to the landlord. Nunley had been placing generators for nine years. Plaintiff was the first person during that time who complained about the diesel smell or complained of injury.

The two neighbors and the landlord all testified plaintiff was "hypersensitive" and "[not] a person of normal sensibilities." The landlord testified she has complained to him about things more than all the other 180 tenants combined.

Plaintiff claims the generator caused her to suffer a sore throat and a headache, which cleared up within an hour or two after the generator was removed. She did not seek medical treatment, nor did she put on any medical expert testimony. She testified she had been suffering from insomnia for seven years.

After a bench trial, in the statement of decision the court ruled plaintiff had failed to prove the elements of nuisance. As to negligence the court found plaintiff had not shown defendant acted unreasonably or breached any duty. It also found her damages were speculative and de minimus. Further, the court found she failed to prove punitive damages.

Plaintiff then filed a motion for new trial claiming "Fraud of Defendant Pacific Bell Telephone Company." (Capitalization omitted.) The court denied the motion, ruling "this motion borders on the frivolous. There are no facts and no law to support it. None whatsoever."

DISCUSSION

1. Standard of Review

Plaintiff challenges the court's decision she did not prove the elements of her negligence cause of action. Where the trial court "has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." (*Sonic Manufacturing Technologies, Inc. v. AAE*

Systems, Inc. (2011) 196 Cal.App.4th 456, 465 (*Sonic*).) "'Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Id.* at p. 466.)

2. Insufficiency of the Evidence of Negligence

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.)

"'Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.' (Evid. Code, § 500.)" (*Sonic*, *supra*, 196 Cal.App.4th at p. 464.) The court found plaintiff failed to prove breach of duty and damages. The record supports those findings.

a. Breach of Duty

Plaintiff's claim as to defendant's breach of duty is unfocused and inconsistent. In her brief, plaintiff's only argument as to the nature of defendant's duty is based on Nunley's testimony defendant should maintain service for its customers during a power outage. Plaintiff does not refer us to any evidence defendant failed to provide services or she was damaged by an interruption of service.

In the complaint plaintiff alleges defendant had a duty to use reasonable care as to the use and placement of the generator. In discussing the alleged breach in her

brief, plaintiff makes various claims, all unsupported by reference to the record.[1] Most of them are wholly irrelevant, such as whether the generator blocked a fire hydrant; defendant has no contract with a third party to set up the generator when SCE plans outages; Nunley did not know defendant's policy about setting up a generator near a residence, and defendant could have had an employee work a graveyard shift to turn off the generator at the same time the outage ended. None of these arguments has anything to do with plaintiff's primary complaint defendant operated the generator such that it was noisy and emitted fumes,[2] and failed to shut the generator off immediately after power outage concluded.

Civil Code section 1714, subdivision (a) sets out a duty to use ordinary care in managing one's property. *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990 provides "ordinary care is satisfied when the conduct conforms to that of 'a reasonably prudent person under like circumstances.'" (*Id*. at p. 1023.)

Whether defendant used ordinary care in operating the generator is beyond the common knowledge of an ordinary person, thus requiring expert testimony. (*Miller v. Los Angeles County Flood Control Dist*. (1973) 8 Cal.3d 689, 702 [where claimed construction defect, expert necessary as to standard of care].) Plaintiff did not introduce

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[1] California Rules of Court, rule 8.204(a)(1)(C) requires a brief to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." This applies to the argument portion as well as to the statement of facts. (See *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [purpose of rule "is to enable appellate justices and staff attorneys to locate relevant portions of the record expeditiously without thumbing through and rereading earlier portions of a brief"].) Failure to comply with the court rules is a ground for forfeiture of claims. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 53.)

[2] This argument spans 11 pages in the brief, mostly a summary of testimony elicited at trial. There was no reasoned legal argument or any supporting authority. This violates California Rules of Court, rule 8.204(a)(1)(B) and we could deem this argument forfeited. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

any expert testimony. The mere fact plaintiff might have heard the generator or smelled diesel alone does not prove a breach of duty. Nor does the fact she complained about it.

Given the standard of review set out above, plaintiff has to show defendant's use of the generator breached its duty as a matter of law. That is, she must show her evidence was neither contradicted nor impeached and left no doubt it was insufficient to support a finding defendant's duty was breached. (*Sonic*, *supra*, 196 Cal.App.4th at p. 466.)

The record easily disposes of this. There was testimony the generator was placed at a proper distance to avert both fumes and noise. There was also testimony as to why the generator was left on until the morning. Further, not one of the other 180 residents complained about noise or fumes. Plaintiff failed to prove defendant breached a duty.

b. Damages

The court ruled damages were de minimus and speculative. The extent of plaintiff's argument in opposition is that she repeatedly told defendant's employees she had insomnia, had to smell diesel fumes in her apartment for hours, was emotionally distressed, was "really upset, aggravated," "irritated, extremely annoyed," and "had a lot of emotional distress, depression and anxiety." She concludes she suffered mental anguish and on that basis she is entitled to damages despite the fact she was not physically injured or monetarily harmed. Plaintiff's argument has no merit.

First, as defendant points out, in the trial court plaintiff waived any award for physical damages. During closing argument, plaintiff stated: "I agree with what defense counsel is saying regarding physical injuries and causation. . . . I'm not going to ask for claims for any physical injuries as far as headaches, irritated eyes, or sore throats, because I did not have an expert specifically for physical injuries."

Plaintiff seems to be requesting only emotional distress damages, citing *Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699 (claim for intentional infliction of

emotional distress and invasion of privacy) and *Leavy v. Cooney* (1963) 214 Cal.App.2d 496, 502 (invasion of privacy). But as shown, both of those cases were based on an alleged intentional tort, not the case here.

Although, as defendant alone pointed out, damages for emotional distress may be awarded where the emotional distress is "serious," there is no evidence of serious emotional distress here. The court's finding plaintiff's damages were de minimus is supported by the evidence. And, as with the other elements, under the standard of review, plaintiff would have to demonstrate the evidence entitled her to damages as a matter of law. She cannot do so.

Plaintiff could not even prove damages in the trial court by a preponderance of the evidence. Temporary headaches and sleep interruption are not substantial damages. Further, there was evidence none of the other 180 residents in the apartment complex complained about fumes or noise. Moreover, testimony shows plaintiff often complained about many other things in comparison to other tenants. It is reasonable for us to infer the court did not give much weight to plaintiff's testimony about her distress. We do not reweigh this evidence on appeal. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

2. Structural Error

As an alternate theory, plaintiff argues the judgment must be reversed due to structural error. She bases this on events arising from a settlement conference, claiming it was improper for defendant to designate a paralegal to act as its representative at the settlement conference.

Without regard to the legal merits of the issue, the claim fails for two reasons. First, plaintiff makes no reference to the record to support this argument in violation of California Rules of Court, rule 8.204(a)(1)(C) requiring citations to the record. Thus the argument has been forfeited. (*Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [argument waived if not supported by references to record].)

Second, as shown in defendant's brief, plaintiff, on the record, represented to the court the case had settled at the mandatory settlement conference and this was reflected in a court order. Plaintiff subsequently withdrew her agreement to settle for unstated reasons. Plaintiff was not deprived of any rights in connection with settling the case and cannot prevail on this issue.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.